Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1314

1776 K STREET ASSOCIATES, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY MEMORANDUM

WHAYNE S. QUIN
1666 K Street, N.W.
Suite 600
Washington, D.C. 20006

Attorney for Petitioners

Of Counsel:

MAUREEN DWYER STEWART
WILKES & ARTIS, CHARTERED
1666 K Street, N.W.
Suite 600
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

I.

THE COURT OF CLAIMS ABUSED ITS DISCRETION IN HOLDING THAT PETITIONERS ARE NOT ENTITLED TO RELIEF FROM JUDGMENT DUE TO A CHANGE IN LAW

In its Brief, the United States argues (Brief in Opp. at 8) that the Court of Claims' decision not to entertain an action for relief from judgment does not constitute an abuse of discretion meriting further review. In so arguing, the United States demonstrates its total lack of understanding of the legal principles governing independent actions and its failure to recognize and acknowledge the exceptional circumstances of this case.

Although relief from a judgment rests in the sound discretion of the court, "The discretion is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles." *Chicago & N.W. Ry. Co.* v. *Davenport et al.*, 95 F. Supp. 469 (D.C. Iowa 1951). The legal principles governing independent actions were set forth by this Court in *Klapprott* v. *United States*, 335 U.S. 601, *modified*, 336 U.S. 942 (1949) when it stated that the "other reason" clause of Rule 60(b)6 [1] "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice" and found exceptional circumstances warranting such relief. (614-615).

In *Ackermann* v. *United States*, 340 U.S. 193 (1950), this Court denied relief based on petitioners' failure to appeal, a situation not present under the facts of this case. In *Polites* v. *United States*, 364 U.S. 426 (1960), petitioners had not only abandoned their appeal but this Court found no clear and authoritative change in law

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[1] Rule 60(b), Fed.R.Civ. P., is the counterpart to Rule 152(b), Rules of United States Court of Claims.

justifying relief. The present case, on the contrary, clearly demonstrates exceptional circumstances, exhaustion of all other avenues of relief either by appeal or otherwise, and a clear and controlling change in the law based on the decision of the Superior Court of the District of Columbia in *Chesapeake & Potomac Telephone Co.* v. *District of Columbia, et al.*, Civil Action No. 2671-75 (consolidated) and the decision of the United States District Court for the District of Columbia in *Oliver T. Carr, Jr.* v. *District of Columbia*, C.A. No. 77-445. These decisions, if applied, would clearly be effective to alter the law controlling petitioners' case. Contrary to the United States' contention (Brief in Opp. at 10), the lower courts have recognized that a change in law *does* constitute an exceptional circumstance justifying relief from a judgment. See, *e.g.*, *Pierce* v. *Cook*, 518 F.2d 720 (10th Cir. 1975), *cert. denied*, 96 Sup. Ct. 866 (1976); *Tsakonites* v. *Trans Pacific Carriers Corporation*, 322 F.Supp. 722 (S.D.N.Y. 1970); *Tarkington* v. *United States Lines Co.*, 222 F.2d 358 (2nd Cir. 1955); *Amsden* v. *United States*, 175 F.Supp. 147, 146 Ct. Cl. 809 (1959); *Hyjack* v. *Nolan*, 366 A.2d 715 (New Jersey 1976). Further, the Court of Claims in its prior decision refused to consider documentary evidence submitted on cross-motions for summary judgment and conceded by the United States to be authentic. The court based its decision on a theory never argued or briefed by the parties. In *Chesapeake & Potomac Telephone Co.* and *Oliver T. Carr, Jr.*, the Superior Court of the District of Columbia and the United States District Court for the District of Columbia found the identical evidence to be authentic, relevant and determinative. Not only did these decisions, now on appeal,[2] settle the law of the District of Columbia

[2] Pending in the District of Columbia Court of Appeals as *United States* v. *C&P Telephone Co.*, Nos. 13570, 14206, 79-499 (oral argument was held on October 23, 1979) and in the United States Court of Appeals for the District of Columbia Circuit as *Carr* v. *District of Columbia*, No. 79-1571. The *Carr* appeal has been stayed pending the outcome of the *C&P Telephone Co.* appeal.

on the original title issue, thereby effecting a clear and controlling change in law; but these courts held that certain documentary evidence which established that petitioners' predecessors in title actually paid for the soil of the alleys, was controlling. Certainly, under such circumstances, equity requires that the Court of Claims at least review the evidence submitted. Accordingly, the Court of Claims' decision not to entertain the action for relief from judgment and to grant the motion to dismiss was a manifest abuse of discretion.

II.

THE COURT OF CLAIMS' REFUSAL TO DEFER TO THE DECISIONS OF THE LOCAL STATE AND FEDERAL COURTS VIOLATES THE PRINCIPLES LAID DOWN BY THIS COURT IN *ERIE*

Contrary to the statement made by the United States in its Brief (Brief in Opp. at 10), petitioners are not arguing that the Court of Claims was mandated by the doctrine of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938) to defer to the decisions of either the Superior Court of the District of Columbia or the United States District Court for the District of Columbia. Rather, petitioners maintain that the Court of Claims' refusal to defer to the decisions of the local state and federal courts violates the principles laid down by this Court in *Erie*: discouraging forum-shopping and promoting uniformity within any given jurisdiction on matters of local substantive law. The cases cited by the United States stand for that very proposition. As the United States Court of Appeals for the District of Columbia stated in *Lee* v. *Flintkote Company*, 593 F.2d 1275, 1278, note 14 (D.C. Cir. 1979):

> "Indeed, were we not to yield a measure of deference to the District of Columbia Court of Appeals, two courts—neither of which could review the others' decisions—would engage independently in formulating the local law of the District. That would subvert the dual aims of *Erie*: discouraging forum-shopping and promoting uniformity within any given jurisdiction on matters of local substantive law. *Erie Railroad* v. *Tompkins*, *supra*, 308 U.S. at 74 to 77, 58 Sup. Ct. at 820 to 822, 82 L.Ed. at 1192 to 1193. As we have heretofore observed, 'it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.'" (Citations omitted.)

To illustrate the inequity of the conflict in decisions, one petitioner, Washington Medical Center, who is also a plaintiff in the *C&P Telephone Co.* case, on the same issue has been treated judicially in diametrically opposing ways. The Court of Claims held that Washington Medical Center did not have title to the abutting alley whereas the Superior Court of the District of Columbia held that it did. Further, the United States' statement that "the decisions invoked here do not apply rules of law enacted or adopted by the local government of the District, but, rather, construe regulations promulgated by the President of the United States under authority of Acts of Congress" seems to imply that there is a federal question involved and therefore local law does not apply. This is simply not true. As held by the Superior Court, the regulations in question were promulgated by President Washington pursuant to that section of the Deeds of Trust authorizing the President to establish "terms and conditions . . . for regulating the materials and manner of buildings and improvements on the lots" in the City of Washington. The construction of the Deeds of Trust, like all questions of title to real and personal property, is clearly a local matter within the domain of the local state and federal courts. Accordingly, their decisions should be given great deference.

III.

THE COURT OF CLAIMS ABUSED ITS DISCRETION IN NOT GRANTING RELIEF FROM THE PRIOR JUDGMENT BASED ON NEWLY DISCOVERED EVIDENCE

On page 12 of its Brief, the United States states that since the new evidence presented "had always been available to the petitioners," it could not serve as the basis for relief from the prior judgment. Were this statement true, newly-discovered evidence could never serve as the basis for a Rule 60(b) or 152(b) motion since the evidence is presumably always in existence and thus always available. The key questions, rather, are whether petitioners exercised due diligence in their search and whether the facts of the case present an unusual situation. Both requirements are met here. First, petitioners diligently searched the available District of Columbia records and justifiably relied on the representations of the District's Surveyor and the Corporation Counsel's Office that title was in the United States. It was only through extensive and prolonged historical research that the relevant ancient documents were located in the National Archives. In the case of *Oliver T. Carr, Jr.*, the United States District Court for the District of Columbia (Judge Thomas A. Flannery) granted an action on the basis of the identical newly discovered evidence stating that:

> "Here the newly discovered records are not in what would be considered a 'normal' location and the facts indicate that plaintiffs did diligently search the District of Columbia records that were available. The representations of the District's Surveyor and the Corporation Counsel's Office are also critical. This case presents an unusual situation not unlike those circumstances where 60(b) relief was granted. * * * The plaintiffs justifiably relied on the defendant's

records and the assertions of its representatives." (Mem. Op. at 4-5).

The Court of Claims, on the other hand, not only refused to entertain the independent action, but did not even permit petitioners to submit evidence on the issue of justifiable reliance or whether evidence was readily available. The court disposed of the independent action by means of a motion to dismiss without even affording petitioners the opportunity to have a fair hearing on the available evidence.

Second, in support of their motion for summary judgment in the Court of Claims, petitioners submitted legal authorities and copies of contemporaneous documents from the National Archives including those entitled "Register of Squares" and "Disposal of Public Lots" wherein alleys were allocated to abutting lots and assigned back to the original proprietors or retained by the Trustees for sale. The United States did not dispute the authenticity of these documents nor did it assert that title was in the United States, much less any legal theory contrary to petitioners. Instead, the United States relied solely upon the defense of estoppel and the argument that fair market charges could be made regardless of the title question. The Court of Claims, in denying petitioners' motion and granting respondents' motion, *sua sponte* asserted and determined that title was in the United States, raising a legal theory never theretofore discussed or briefed by the parties; namely, that original alleys were part of the second category of land under the deeds of trust, public appropriations directed by the President in the Building Regulations of 1791. Further, the court omitted discussion of certain contemporaneous authorities, such as the letter of the Commissioners dated September 7, 1976,[3] and rejected other documentation as

[3] The letter from the Commissioners is set out in Entry No. 494, pp. 188 and 189 of the Records of the Office of Public Buildings and Grants and States: "The alleys within the Squares not having been directed by the President, or conveyed by the original proprietors for public use, but on the contrary, being paid for by the purchasers of the Squares, we are of the opinion, that where the whole Square belongs to one person, or to several persons, who will all concur in the measure, that those alleys may be shut up, or otherwise, as appropriated as the proprietor or proprietors judge most for their advantage." Further, in *Pratt* v. *Law*, 13 U.S. (9 Cranch) 453, 476 (1815), this Court found that "It was the universal practice for the Commissioners in selling lots to charge each lot with its proportion of the alley laid out for the benefit of the lots in the squares..."

being "unintelligible and illegible" and "not proved up in a proper way . . ." No request to petitioners was made by the Court of Claims for more legible documents nor are petitioners aware that the court below resorted to the more legible and enlarged original exhibits filed with the Clerk.

Faced with the Court of Claims' refusal to consider relevant documentary evidence, the authenticity of which was not in dispute, petitioners then went back to the National Archives and obtained the affidavit of Lee Antoinette to authenticate the Register of Squares and Disposal of Public Lot documents. Petitioners at that time discovered the further evidence that establishes that the petitioners' predecessors in title actually paid for the alley areas. Since the Court of Claims had granted the United States' motion for summary judgment without giving petitioners an opportunity to cure any technical deficiencies of proof, regarding documents conceded by the United States to be authentic, petitioners were relegated to a motion for reconsideration and later, a motion for relief from judgment under Rule 152(b). From the above facts it is clear that the Court of Claims abused its discretion in not granting petitioners relief from the prior judgment based on newly discovered evidence.[4]

[4] The documentation ignored by the Court of Claims is contained in a large bound volume, two copies of which petitioners have respectfully lodged with this Court for its consideration.

IV.

THE COURT OF CLAIMS ERRONEOUSLY APPLIED PRINCIPLES OF ESTOPPEL

The United States also supports the Court of Claims' decision to apply estoppel against petitioners stating that the record in *Washington Medical* provided the factual basis for the court's determination (Brief in Opp. at 12, fn.11). On the contrary, the record in *Washington Medical* is totally devoid of any facts concerning misrepresentation or concealment of any material facts by petitioners, an essential element of equitable estoppel. *1776 K Street Associates* v. *District of Columbia*, C.A. No. 2015-70. In view of the fact that an alley could only be closed upon a finding that it was "unnecessary" and "useless," there is likewise no evidence of any detriment the District could possibly have suffered by reason of such closings, a second essential element of equitable estoppel. Finally, the Court of Claims' decision to apply the doctrine of estoppel totally contradicts its earlier *Washington Medical* decision that, under these facts, the doctrine is not applicable. Again, it is indeed ironic that plaintiffs in *Carr* were given independent action relief by another federal court, but that petitioners herein, who actually found the underlying evidence of title and upon which *Carr* depended (see 543 F.2d at 921, fn. 13), were not even permitted to present evidence to the Court of Claims either on the merits or on the issue of estoppel.

V.

THE COURT OF CLAIMS' ERRONEOUS DETERMINATION OF THE TITLE ISSUE AMOUNTS TO A TAKING OF PETITIONERS' PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION

In footnote 11 of its Brief (Brief in Opp. at 12), the United States argues that the Court of Claims' refusal

to set aside its prior erroneous determination does not amount to a "taking" of petitioners' property in violation of the Fifth Amendment. Apparently, the United States argues that the "taking" was accomplished in *Washington Medical* when the Court of Claims erroneously found that the United States owned title to the original alleys and the subsequent ruling of that court, which has the effect of allowing its prior decision to stand, is not a "taking." This argument is specious at best. It is difficult to see how requiring petitioners to buy their own land is not in fact a taking of their property in violation of the Fifth Amendment, whether that requirement is imposed by virtue of the Court of Claims' initial decision or its refusal to allow an independent action.

VI.

THE ISSUE OF TITLE TO ORIGINAL ALLEYS IN THE DISTRICT OF COLUMBIA IS OF MAJOR IMPORTANCE NOT ONLY TO THE PRESENT LITIGANTS BUT TO FUTURE LITIGANTS

As set forth in the petition for a writ of certiorari,[5] the issue of title to the original alleys is the only remaining title issue yet to be clearly determined by the Court under the original Deeds of Trust establishing the City

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[5] On March 14, 1980, petitioners filed a motion to defer consideration of the petition for a writ of certiorari until final decisions are rendered in the *C&P Telephone Co.* appeal and the *Carr* appeal. The Brief in Opposition submitted by the United States is conspicuously absent any mention of this motion. Petitioners would like to emphasize that the decision of the District of Columbia Court of Appeals as well as the decision of the United States Court of Appeals for the District of Columbia Circuit could have a substantial effect upon this case and may provide new or additional reasons for this Court to grant Certiorari. Accordingly, it is requested that the motion for deferral of consideration be granted.

of Washington. A decision by this Court is critical at this time to resolve existing conflicts between decisions on this issue and to govern future alley closings. While geographically, the title issue is primarily a local matter, the issue has national historical significance as it relates to the founding of our Capitol and has economic importance in the quieting of title and orderly development of the downtown area of the District of Columbia. Accordingly, the question of title to the original alleys of the City of Washington is of sufficient importance to merit review by the Court.

VII.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted, or in the alternative the Court should summarily reverse and remand the case to the Court of Claims for full consideration of petitioner's evidence and trial on the issue of title to the soil of the alleys.

Respectfully submitted,

By_____

WHAYNE S. QUIN
1666 K Street, N.W.
Suite 600
Washington, D.C. 20006

Attorney for Petitioners

Of Counsel:

MAUREEN DWYER STEWART
WILKES & ARTIS, CHARTERED
1666 K Street, N.W.
Suite 600
Washington, D.C. 20006